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In the Supreme Court of the United States

October Term, 1973

No. No. 73-669

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al,

Petitioners,

v.

ALUMINUM COMPANY OF AMERICA,

Respondent.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 29, 1973

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The Petitioners, motor carriers, herein renew their prayer that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceedings on July 12, 1973.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent shipper's Statement of the Case and its brief in opposition seem to suggest that the Commission, in the investigation proceedings which underlie the present suit, was dealing with past charges. That proceeding, *Increased Rates and Charges From, To and Between Middlewest Territory*, 335 I.C.C. 142 (1969), involved an investigation of tariff items which were effective throughout the course of the Com-

mission's investigation proceeding. Indeed, those rates were being applied even after the Commission's reasoned decision of June 5, 1969, and thereafter until the August 30, 1969 cancellation date. It is obvious, therefore, that evidence regarding such shipments as formed the basis for the claims in the court below and the past charges thereon were not and could not have been before the I.C.C. in the course of the investigation proceeding. By the same token, the actual cost, expense and revenue information surrounding the actual shipments involved in the present "enforcement" suits could not have been before the Commission in the investigation proceeding.

The carriers did attempt to present historic evidence to the I.C.C. relating to a portion of the shipments of freight under the tariffs which had been increased effective April 1, 1968. That attempt was made following the entry of the Commission's "refund order" of June 5, 1969. However, that request for further hearing and the tender of supporting evidence was rejected by the Commission in the investigation docket. B-31.[1]

Later before the three-judge tribunal on direct appeal of the refund language, the carriers sought to have the historic evidence relating to shipments transported under the increased tariffs evaluated, but the three-judge tribunal held that the case before it was not an enforcement proceeding. *Admiral-Merchants Motor Freight, Inc. v. United States*, 321 F. Supp. 353 (D.Colo., 1971). On appeal, this Court affirmed the three-judge court's refusal to annul. 404 U.S. 802, 30 L. Ed.2d 37, 92 S. Ct. 51 (1971), petition for rehearing denied, 404 U.S. 987, 30 L. Ed.2d 371, 92 S. Ct. 443 (1971).

Respondent shipper in its Brief in Opposition also suggests that the three-judge court held the refund language valid. While the three-judge tribunal refused to annul that language, apparently because of the inequitable posture of the plaintiff carriers, at no time did it state that the refund language was enforceable – those issues were left to the enforcement court. *Cf., Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576, 16 L. Ed.2d 109, 86 S. Ct. 1000 (1966).

[1] The reference is to Appendix B(5) of Appellant's Petition.

REASONS FOR GRANTING THE WRIT

1. Respondent shipper asserts in its Brief in Opposition that:

> The remaining question as to whether Section 16(2) of the Interstate Commerce Act has been incorporated into the Motor Carrier Act so as to establish a private cause of action for enforcement of an I.C.C. order for the payment of money, is so clearly established that it does not warrant further consideration from this Court.

Petitioners respectfully note that not one case is cited by Respondent in support of this alleged prior clear establishment. Indeed, there is no precedent for such incorporation, as was conceded by the Seventh Circuit. The Commission's refund order is also unique in history of the Interstate Commerce Act. It was not a reparations order entered under Part I in compliance with the provisions thereof; nor was it of the type for which the Part I enforcement provisions were created. Nor would the order have qualified as a refund order under Part I, since none of the requirements of 49 U.S.C., Section 15(7) had been met.

There is not even any rail precedent for the enforcement of a Commission order such as the present order by private shippers against railroads. Section 16 deals with Commission rail reparations orders. But, under Part II, the Commission's power is limited to issuing findings in aid of a court suit for reparations. The Part I provision applied has been determined to be simply a reparations enforcement provision. In dealing with the limitations provisions contained in Section 16(3) which are integrated into the cause of action under Section 16(2), this Court stated:

> On its face it has to do only with the commencement of actions or *reparation* proceedings before the Commission. *United States v. Western Pac. R.R.*, 352 U.S. 59, 1 L. Ed.2d 126, 136, 77 S. Ct. 161 (1956). (Emphasis added).

However, the instant case and the Commission's decisions were not related to reparations. B-33, B-34, B-35, D, 11, D-11, D-12, D-35, and D-62. The finding which is the *sine qua non* of a suit seeking deviation from effective tariff levels – that the actual charges were unjust and unreasonable when applied – has never been made, as was noted by the courts below. In applying the provisions of Section 16(2), the Seventh Circuit below concurrently refused application of the conditions precedent set forth in the normally adjunct provisions of Section 16(1). D-65. Under these circumstances, it is apparent that prior precedent consistent with the determinations of the courts below cannot be located.

2. The ramifications of the circuit decision are utterly inconsistent with prior determinations by this Court. A major ramification involving a direct conflict with prior precedent of this Court is the reliance by Respondent and the courts below upon the purported "agreement" or "waiver" by the carriers. The following principle with respect to such waiver or agreement has been consistently followed throughout the course of the Interstate Commerce Act's application.

> The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. *A. J. Phillips Co. v. Grand Trunk W. R.R.*, 236 U.S. 662, 667, 59 L. Ed. 774, 777, 35 S. Ct. 444 (1915).

See also *Ky. Nat'l Gas Co. v. R.R. Comm'n*, 290 U.S. 264, 78 L. Ed. 307, 54 S. Ct. 154 (1933), (no estoppel); *United States v. Chicago M. & St. P. & P. R.R.*, 282 U.S. 311, 75 L. Ed. 359, 51 S. Ct. 159 (1931), (no acceptance of invalid portion of order by acceptance of valid portion); *United States v. Western Pac. R.R.*, *supra*, (private shippers not entitled to utilize estoppel to justify variation from rates charged under effective tariffs); and cases cited at page 14 of Petition for Certiorari.

3. The carriers, in the court below, sought to defend the cases, *inter alia*, on the grounds of the affirmative reasonableness of the rates when applied to the shipments involved (*United States v. Western Pac. R.R., supra*) and upon the grounds that the refund language, when applied, would result in confiscation of property (*Baltimore & Ohio R.R. v. United States*, 298 U.S. 349, 80 L. Ed. 1209, 56 S. Ct. 797 (1936)). These defenses were foreclosed by the strict liability holding of the court below which effectively made the "not shown" finding of the Commission conclusive in respect of an enforcement case, contrary to all prior precedent in this Court and contrary to the statutory language contained in Section 16(2).

> If the Commission finds that the proposed rates are unreasonable, *rather than that the railroads failed to carry their burden of proof*, that finding *might* be conclusive in a subsequent proceeding. *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, ____ U.S. ____, 37 L. Ed.2d 350, 93 S. Ct. ____ (1973), at n. 9 (Emphasis added).

Concurrently, the enforcement courts below refused the carriers access to a challenge of the admissibility of the order

> on the grounds, for example that the Commission did not afford the carrier a fair hearing or that the order was based upon substantial evidence. *Interstate Commerce Comm'n v. Atlantic Coast Line R.R.*, 383 U.S. 576, 594, n.6, 16 L. Ed.2d 109, 86 S. Ct. 1000 (1966).

In point of fact, there has never been any judicial contest permitted regarding the actual historic facts surrounding the shipments upon which the Respondent shipper below sought to obtain deviations from the unsuspended and effective tariff charges and recovery of damages.

4. Respondent has challenged the Petitioners' reliance upon this Court's opinion in *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 3 L. Ed.2d 952, 79 S. Ct. 904 (1959), as being wholly inapplicable. To the contrary, not only is the rationale

of that case direct and express in opposition to the result reached below, but, indeed, on the merits, that case involved and considered the refunds concept itself. In *United States v. Davidson Transfer & Storage Co.*, 259 F.2d 802, 805, 806 (D.C. Cir., 1958), the court noted that refunds could not be awarded against motor carriers, there being no Section 15(7) in Part II of the Interstate Commerce Act. While the decision of the D.C. Circuit was reversed in *T.I.M.E., Inc. v. United States, supra*, the reversal did not affect in any way the conclusion drawn by the Circuit with respect to the availability of refund orders against motor carriers. The reversal in the Supreme Court was because the Circuit had ordered a remand to the I.C.C. to make findings which, under the then existing status of the law, could not be implemented once made. In short, the *T.I.M.E.* decision has far broader application to this proceeding than Respondent is willing to recognize.

5. Respondent shipper implies that there is no conflict between the decisions which have derived from the refund language of the Commission in I.C.C. Docket No. 34971 on the merits in the various enforcement cases.[2] Respondents respectfully refer the Court to Appendix A attached to the Petition for Certiorari. It will be noted, *inter alia*, that the sister complaint of *Container Corporation* was dismissed and judgment was entered for the defendant carriers therein. *Container Corp. v. Admiral-Merchants Motor Freight, Inc.*,

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[2]It asserts that the only potentially adverse decision was *Bela Seating Company v. Advance Transportation Co.*, 344 F. Supp. 854 (N.D. Ill., 1972). That case, decided by the same trial judge who decided the cases involved in the instant Petition, does indeed present a conflict on the merits – but only in respect of the statute of limitations questions which were determined differently therein. Indeed, the *Bela* decision is itself in direct conflict with prior precedents of this court, e.g., *A. J. Phillips v. Grand Trunk W. R.R., supra.* Whereas, the court in *Bela* ruled that the limitation on shipper's right to sue "within one year of the date of the order" was tolled by the direct appeal litigation, this Honorable Court held, in *Phillips*, that the plaintiff must sue within the exact period set forth in the statute in compliance with the statutory language, irrespective of direct appeals – or, that the plaintiff must join in the direct attack upon the Commission's order in order to preserve its claim.

Civil Action No. 71-C-996 (N.D. Ill., 1972), appeal pending, Seventh Circuit Docket 72-1646. Furthermore, the lower court decisions are highly deviant on issues such as the awarding of pre-judgment interest and attorney fees – a matter obviously causing wide variances in net rates between shippers. But, the enormity of the importance of the issues sought to be presented cannot be minimized by the lack of conflicts between the circuits. Conflicts have been shown to exist with prior decisions of this Honorable Court. The order being totally unique in the history of the Act, and the present case being the first to reach the appellate courts, it is to be expected that there would be no developed substantial conflicts on the merits, simply because the underlying I.C.C. order is unique and no courts have considered the issues prior to the ingenious approaches and novel rulings below.

6. It is interesting to note that Respondent's brief barely touches upon the extreme importance of the questions presented in terms of the continued and future application of the Interstate Commerce Act – to the entire transportation industry regulated by the Commission, to the shippers, and to the consuming public. These important questions of federal law should be settled by this Court.

CONCLUSION

The carrier Petitioners have consistently sought an opportunity to have the claims tested upon judicial facts and historical evidence. Fundamental fairness would seem to require a hearing *at some stage* before a person is deprived of monies collected pursuant to tariffs which not only have the force and effect of a statute (*Pennsylvania R.R. v. Int'l Coal Mining Co.*, 230 U.S. 184, 57 L. Ed. 1446, 33 S. Ct. 893 (1913)), but carry a presumption of lawfulness, even though carrier-initiated. That presumption was not modified by the finding that the rates had not been proven just and reasonable for the *future*. Two inconclusive determinations (that the rates involved were not shown to be just and reasonable for the future, and that the carriers lacked sufficient equity to obtain an equitable annulment of the order) have been manipulated by the court

below into strict liability foreclosing virtually all attacks, including attacks based upon the Federal Constitution, in the enforcement proceeding.

WHEREFORE, premises considered, the Petitioners again pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, and that, following the issuance thereof, this Honorable Court reverse said judgment and opinion.

Respectfully submitted,

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